Nos. 99-5, 99-29

IN THE
SUPREME COURT OF THE UNITED STATES

UNITED STATES*, Petitioner,*

v.

ANTONIO J. MORRISON AND
JAMES LANDALE CRAWFORD*, Respondents*.

CHRISTY BRZONKALA*, Petitioner,*

v.

ANTONIO J. MORRISON AND
JAMES LANDALE CRAWFORD*, Respondents*.

On Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

BRIEF OF SENATOR JOSEPH R. BIDEN, JR. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Senator Joseph R. Biden, Jr. is the author of the Violence Against Women Act, which includes the civil rights remedy at issue in this case. The Act enjoyed tremendous bipartisan support, with 68 cosponsors in the Senate and 226 cosponsors in the House of Representatives, and passed both Houses by overwhelming margins.

As a former Chairman of the Senate Judiciary Committee, chief sponsor of the Act, and champion of its civil rights remedy, Senator Biden is uniquely qualified to offer the congressional perspective as to why the civil rights provision is both necessary and within Congress' power, pursuant to the Commerce Clause and § 5 of the Fourteenth Amendment. He believes that his detailed description of the statute's history and supporting legislative record will aid the Court in resolving the issues presented.[2]

STATEMENT

1. Senator Biden first introduced the Violence Against Women Act in 1990 "in response to the escalating problem of violence against women," S. Rep. No. 103-138, at 37 (1993) ("1993 S. Rep.")—an unfolding "national tragedy played out every day in the lives of millions of American women at home, in the workplace, and on the street." S. Rep. No. 102-197, at 39 (1991) ("1991 S. Rep."). During the four-year investigation that followed, Congress heard testimony from a wide range of experts, including judges, law enforcement officers, prosecutors, state attorneys general, law professors, social scientists, physicians, and victims of violence, and generated a massive legislative

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[1] In accordance with Supreme Court Rule 37.6, amicus curiae represents that no counsel for a party authored this brief in whole or in part, and no person or entity, other than amicus, has made a monetary contribution to the preparation or submission of this brief. All parties to these consolidated cases have consented to the filing of this brief, and the letters of consent have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

[2] Senator Biden also has written a law review article defending the constitutionality of the Violence Against Women Act civil rights remedy. The article is expected in print this January. *See* Joseph R. Biden, Jr., *The Civil Rights Remedy of the Violence Against Women Act: A Defense*, 37 Harv. J. on Legis. (forthcoming Jan. 2000).

record in support of the legislation.[3]

As detailed below, the legislative record amassed by Congress after years of testimony and close analysis demonstrates that violence against women was (and is) a national problem of the first order, a problem that Congress found seriously impeded women from participating fully in the commercial life of the nation—and one that state legal systems had been both unable and unwilling to remedy.

2. Senator Biden introduced the Violence Against Women Act, comprehensive federal legislation to combat violent crime against women, in each of the 101st through 103d Congresses. *See* S. 2754, 101st Cong. (1990); S. 15, 102d Cong. (1991); S. 11, 103d Cong. (1993). Companion legislation was introduced in the House. H.R. 5468, 101st Cong. (1990); H.R. 1502, 102d Cong. (1991); H.R. 1133, 103d Cong. (1993). The Act enjoyed tremendous bipartisan support and passed both Houses by overwhelming margins.[4] After a conference to work out

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[3] *See, e.g., Domestic Violence: Not Just a Family Matter: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary,* 103d Cong. (1994) ("1994 H.R. Hrg."); *Crimes of Violence Motivated by Gender: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong. (1993) ("1993 H.R. Hrg."); *Violence Against Women: Fighting the Fear: Hearing Before the Senate Comm. on the Judiciary,* 103d Cong. (1993) ("Nov. 1993 S. Hrg."); *Violent Crimes Against Women: Hearing Before the Senate Comm. on the Judiciary,* 103d Cong. (1993) ("Apr. 1993 S. Hrg."); *Hearing on Domestic Violence: Hearing Before the Senate Comm. on the Judiciary,* 103d Cong. (1993) ("Feb. 1993 S. Hrg."); *Violence Against Women: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary,* 102d Cong. (1992) ("1992 H.R. Hrg."); *Violence Against Women: Victims of the System: Hearing Before the Senate Comm. on the Judiciary,* 102d Cong. (1991) ("1991 S. Hrg."); *Women and Violence: Hearings Before the Senate Comm. on the Judiciary,* 101st Cong. (1990) ("1990 S. Hrg."); *Domestic Violence: Terrorism in the Home: Hearing Before the Subcomm. on Children, Family, Drugs and Alcoholism of the Senate Comm. on Labor and Human Resources,* 101st Cong. (1990) ("1990 S. Labor Hrg.").

[4] S. 11, reported favorably by the Senate Judiciary Committee in 1993, claimed a total of 68 cosponsors; its House counterpart, H.R. 1133, 226 cosponsors. The Senate amended the pending crime bill, S. 1607, 103d Cong.

differences between the two bills,[5] both legislative bodies adopted the Conference Report, 140 Cong. Rec. 24,115 (1994) (Senate passage); 140 Cong. Rec. 23,618 (1994) (House passage), and on September 13, 1994, the President signed into law the Violent Crime Control and Law Enforcement Act of 1994, which included the Violence Against Women Act.

3. In addressing violence against women, Congress employed "several different complementary strategies," 1991 S. Rep. 34, to attack the problem on all fronts. A key subtitle in this multifaceted legislative scheme, the Civil Rights Remedies for Gender-Motivated Violence Act, creates a new federal civil cause of action that allows victims of gender-motivated violence to sue their attackers in court. *See* Pub. L. No. 103-322, Title IV, Subtitle C, §§ 40301-40303, 108 Stat. 1941-42 (codified at 42 U.S.C. § 13981). The civil rights remedy was among the most closely considered provisions of the Violence Against Women Act. After years of expert testimony and careful deliberation, Congress concluded that the provision was necessary; Congress further determined in both the statutory text, § 13981(a), and committee findings that it had the power to enact the provision pursuant to both the Commerce Clause, U.S. Const. art. I, § 8, and § 5 of the Fourteenth

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(1993), to include the Violence Against Women Act, by a vote of 94 to 4, 139 Cong. Rec. 27,547 (1993), and then incorporated the bill into the House version, H.R. 3355, 103d Cong. (1993), which the Senate passed on November 19, 1993. 139 Cong. Rec. 30,588 (1993). The House initially passed the Violence Against Women Act as H.R. 1133 on November 20, 1993, by the unanimous vote of 421 to 0. 139 Cong. Rec. 31,337 (1993). On April 14, 1994, the House again passed the Act as part of a crime bill, H.R. 4092, 103d Cong. (1994), which the House then incorporated into H.R. 3355. 140 Cong. Rec. 8141-42 (1994).

[5] One issue was whether to include the civil rights remedy. To avoid potential opposition, the House Judiciary Committee dropped the civil rights provision from H.R. 1133 before reporting it favorably out of committee. *Compare* H.R. Rep. No. 103-395, at 1-24 (1993) ("1993 H.R. Rep.") (as amended), *with* H.R. 1133, Title III, § 301 (as introduced). The civil rights remedy was not included in the versions of the Act which initially passed the House; however, the provision was restored in Conference. *See* H.R. Conf. Rep. No. 103-711, at 385 (1994) ("H.R. Conf. Rep.").

Amendment. For the reasons set forth below, that determination was correct.

SUMMARY OF ARGUMENT

This case is one of exceptional importance because it tests whether Congress has power to address significant national problems that it has determined obstruct interstate commerce and threaten principles of equality, and to which the states have proved unable to respond. The court of appeals held that the civil rights remedy of the Violence Against Women Act, legislation designed to address one such national problem, exceeded Congress' authority under both the Commerce Clause and § 5 of the Fourteenth Amendment. The court was in error.

In *United States v. Lopez*, 514 U.S. 549 (1995), and *City of Boerne v. Flores*, 521 U.S. 507 (1997), this Court invalidated acts of Congress because Congress failed to make the case for federal action. In *Lopez*, the Court struck down the Gun-Free School Zones Act in part because gun possession near schools had no evident connection to interstate commerce, and Congress had made no findings that would have aided the Court in evaluating the legislative judgment. Similarly, in *Boerne*, the Court found the Religious Freedom Restoration Act an impermissible legislative effort to redefine the meaning of the First Amendment because the legislative record failed to support a narrower, clearly legitimate aim of redressing laws that unconstitutionally discriminated against religious beliefs and practices.

1. The Violence Against Women Act civil rights remedy is different. After four years of exhaustive hearings, Congress made the specific findings and developed the extensive record lacking in the statutes recently invalidated by this Court. With respect to the Commerce Clause, Congress expressly found that gender-based violence substantially and directly affects interstate commerce by preventing a discrete group, women, from participating fully in the day-to-day commerce of our nation. The legislative record reflects that gender-based violence denies women the opportunity to secure and maintain employment on an equal footing with men, exacting a heavy toll on the national economy and interstate commerce. Witness after witness testified that as a result of rape, sexual assault, or domestic abuse, she (or someone she knew) was fired from, forced to quit, or had abandoned her

job. Violence against women and the threat of such violence, Congress also learned, robs women of the most basic attributes of commercial existence—the ability to go grocery shopping, patronize shopping malls and public accommodations, walk the streets, and use public transportation. Congress heard considerable testimony that gender-based violence likewise denies women the fundamental right to travel from state to state and to procure an education free from sexual assault.

In short, Congress reasonably determined that the singling out of women to bear the brunt of so many crimes of violence imposes an "artificial restriction on the market" that brings the problem within the federal ambit. As this Court long has recognized, Congress has power to remove obstructions to interstate commerce, whatever their source. In authorizing a civil cause of action for victims to vindicate their right to be free from violence motivated by gender animus, the statute continues, and is in keeping with, a venerable tradition of federal civil rights laws.

2. With respect to § 5 of the Fourteenth Amendment, Congress expressly found, and the record reflects, that widespread gender bias has led state criminal and civil legal systems to treat gender-based crimes of violence less seriously than other major crimes, denying victims the equal protection of the laws and the redress to which they are entitled. Congress found that state legal systems have institutionalized the historic prejudices against victims of rape or domestic violence by erecting formal and informal barriers to justice not encountered by victims of other serious crimes—barriers that many courts already have recognized violate the Equal Protection Clause. The civil rights remedy is specifically designed to compensate for state violations of equal protection by putting directly into the hands of victims a legal tool that will enable *them* to secure the vindication and recompense too often denied them as a result of biased and unequal law enforcement in state legal systems.

The civil rights remedy was carefully crafted in the best spirit of cooperative federalism, undergoing many revisions on a bipartisan basis for the very purpose of minimizing the invasion into state prerogatives. Congress provided a civil remedy for victims that supplements, but does not displace, available state remedies, and one that minimally interferes with state sovereignty. Once Congress, after undertaking a careful investigation into a national problem of the first order, makes specific findings supporting the exercise of federal power and the congressional

choice of remedy, its judgment is entitled to substantial deference.

ARGUMENT

I. THE CIVIL RIGHTS REMEDY IS A VALID EXERCISE OF CONGRESS' AUTHORITY UNDER THE COMMERCE CLAUSE.

The court of appeals acknowledged that "[t]he legislative record in this case, considered as a whole, shows that violence against women is a sobering problem and also that such violence ultimately does take a toll on the national economy." Pet. App. 68a. The court also agreed that "Congress' specific findings regarding the relationship between gender-motivated violence and interstate commerce . . . depict the manner in which such violence affects interstate commerce." *Id.* at 68a-69a. This recognition by the court of appeals should have ended the matter—but it did not.

Instead, the Fourth Circuit ruled that § 13981 fails under the Commerce Clause for two reasons. The court concluded first, that like the Gun-Free School Zones Act struck down in *United States v. Lopez*, 514 U.S. 549 (1995), the nexus to interstate commerce of the regulated activity (here, gender-based violence) is too attenuated, and second, that § 13981 fails to heed principles of federalism. *Id.* at 31a-51a.

Neither of these conclusions is correct. As detailed below, § 13981 stands on firmer Commerce Clause ground, and is drafted in a manner more mindful of federalism concerns, than the statute invalidated in *Lopez*.

A. Congress Made Express Findings, Based on a Sufficient Record, That Gender-Based Violence Substantially Affects Interstate Commerce.

The Fourth Circuit claimed that it could "discern no . . . distinct nexus between violence motivated by gender animus and interstate commerce." Pet. App. 34a. Instead, the court accused the defenders of § 13981 of relying on an attenuated "costs of violent crime" rationale on a par with the one offered in *Lopez*. Because it failed to appreciate the differences between this case and *Lopez*, the court of appeals refused to give Congress' specific and detailed findings—which were predicated on an exhaustive supporting record—the proper deference they are due.

1. We have no quarrel with this Court's view in *Lopez* that congressional findings are important for courts "to evaluate the legislative judgment that the activity in question substantially affected interstate commerce," especially where, as was the case in *Lopez*, the connection between the activity and interstate commerce is not "visible to the naked eye." *Lopez*, 514 U.S. at 563. This Court invalidated the statute in *Lopez* in part because of Congress' failure to make the case for regulating gun possession near schools, conduct that in the Court's view, was neither economic in nature nor likely to exert a substantial effect on interstate commerce. *Id.* at 567. The same simply cannot be said of the Violence Against Women Act civil rights remedy. In sharp contrast to the Gun-Free School Zones Act, where Congress made no findings and the effect of the criminalized conduct on interstate commerce was comparatively trivial, § 13981 was the subject of numerous hearings and extensive findings by a Congress cognizant of the limits of its powers.

a. First, Congress explicitly found that gender-motivated violence against women substantially affects interstate commerce. As the Conference Report stated:

> [C]rimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce; crimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products . . . .

H.R. Conf. Rep. 385.[6] Similar findings were made in Senate Judiciary Committee reports. The Committee found:

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[6] These findings were originally intended for the text of the statute, *see* S. 11, § 302(a), 103d Cong. (1993); 1993 S. Rep. 29, but were ultimately removed from the text to avoid cluttering the U.S. Code. Victoria F. Nourse, *Where Violence, Relationship, and Equality Meet: The Violence Against Women Act's Civil Rights Remedy*, 11 Wis. Women's L.J. 1, 36 (1996) (discussing the statute's legislative history).

> Gender-based crimes and the fear of gender-based crimes restricts movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending, all of which affect interstate commerce and the national economy. Gender-based violence bars its most likely targets—women—from full [participation] in the national economy.

1993 S. Rep. 54; *accord* 1991 S. Rep. 53; S. Rep. No. 101-545, at 43 (1990) ("1990 S. Rep.").

Second, while the Supreme Court in *Lopez* concluded that the relationship between gun possession near schools and interstate commerce was unduly attenuated, *Lopez*, 514 U.S. at 564-67, the connection between gender-based violence and interstate commerce is direct and confirmed by an ample legislative record. Congress heard testimony from dozens of victims and experts regarding the devastating impact of gender-based violence on the ability of women to participate in economic activities on an equal footing with men.

Congress determined that gender-based violence denies women an equal opportunity to compete in the job market, imposing a heavy burden on the national economy and interstate commerce. Witness after witness testified that as a result of rape, sexual assault, or domestic abuse, she (or someone she knew) was fired from, forced to quit, or had abandoned her job.[7] The Senate Judiciary Committee recognized "that almost 50 percent of rape victims lose their jobs or are forced to quit in the aftermath of the crime." 1993 S. Rep. 54. Those women who remain employed still face a period of decreased productivity, 1990 S. Rep. 33, with many missing work because they "either cannot leave their homes or

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[7] *See, e.g.*, 1994 H.R. Hrg. 15 (Pegi Shriver) (abusive husband caused her to lose her job); Nov. 1993 S. Hrg. 31 (Karen Gigey) (abusive husband caused her to lose job by hounding her at work); *id.* at 14 (Lisa) (after baby was born, husband did not allow her to go back to work); 1991 S. Hrg. 132-33 (Amy Kaylor) (rape led to her losing her job because of time missed from work); *id.* at 292-93 (letter from Dawn Bosshard) (employer fired her after she took medical leave following gang rape); 1990 S. Hrg., Pt. 1, at 27 (Marla Hanson) (sexual assault ended her modeling career); 139 Cong. Rec. 31,291 (1993) (Rep. Olver) (describing letter from victim of abuse who could not hold a job because of husband's harassment at work).

are afraid to show the physical effects of the violence." *Id.* at 37. As a therapist at Polaroid Corp. testified, the battered women in his company's support group "identified a clear relationship between spousal abuse and such bottom-line issues as tardiness, poor job performance, increased medical claims, interpersonal conflicts in the workplace, depression, stress, and substance abuse." Feb. 1993 S. Hrg. 16 (James Hardeman).[8]

As a result of such interference with the ability of women to work, domestic violence was estimated to cost employers between $3 and $5 billion annually as a result of absenteeism in the workplace.[9] Even the *threat* of gender-based violence, Congress found, adversely affects interstate commerce by deterring women from taking jobs in certain areas or at certain hours that pose a significant risk of such violence. 1993 S. Rep. 54.[10] For all of these reasons, "[i]n pure economic terms, the sheer

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[8] The National Federation of Business and Professional Women, Inc. likewise testified: "Women who either cannot leave their homes or are afraid to show the physical effects of the violence will either forego employment opportunities available or jeopardize their current employment by absenteeism and poor work performance." 1991 S. Hrg. 241; *see, e.g.*, 1994 H.R. Hrg. 17 (Karla M. Digirolamo) (recounting how she "began missing more and more work" because her husband "kept [her] home or [she] was unable to leave because of the visible injuries [she] had sustained").

[9] 1991 S. Hrg. 240 (National Federation of Business and Professional Women, Inc.); *see also* 1994 H.R. Hrg. 9 (Vicki Coffey, Executive Director, Chicago Abused Women Coalition) ("Businesses lose billions of dollars annually due to absenteeism and loss of productivity because employees are abused.").

[10] *See* 1991 S. Hrg. 86 (Prof. Burt Neuborne) ("[W]omen who do enter the work force tend to choose their jobs with one eye looking over their shoulder about their safety. They can't work late like men can work; they can't work overtime; they can't take jobs in localities that are considered to be dangerous. Their employment opportunities have a ceiling placed upon them that you don't read in title VII."); *id.* at 92; *id.* at 240-41 (National Federation of Business and Professional Women, Inc.) ("Deprived of the ability to be safe in their own homes, to walk freely on the streets, and to travel alone without fear of attac[k], women find their employment options in life sharply reduced."); *see, e.g.*, 1990 S. Hrg., Pt. 1, at 22-23 (Nancy Ziegenmeyer) (rape victim gave up plans of becoming a real estate agent because "[t]he prospect

loss of productivity attributable to violent gender-based assault is staggering." 1991 S. Hrg. 95 (Prof. Burt Neuborne).

The evidence before Congress illustrates countless other ways in which gender-based violence obstructs women's participation in economic life and their ability to move and travel freely. Congress heard from women who saw the most basic privileges of commercial existence—the ability to go grocery shopping, frequent shopping malls, walk the streets, and even mail correspondence—severely restricted by gender-based violence.[11] Violence against women and the threat of such violence significantly impair women's freedom of movement and economic opportunities by deterring them from using public accommodations, sidewalks, streets, parking lots, and transportation—the very channels and instrumentalities of interstate commerce.[12] Congress found that because "fear of rape is central to the day-to-day concerns of

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of going into an unoccupied building with a stranger is terrifying to me" and now fears traveling and staying in lodging away from home).

[11] *See, e.g.*, 1994 H.R. Hrg. 17 (Karla M. Digirolamo) (husband deprived her of money, forcing her to beg for food and money); Feb. 1993 S. Hrg. 15 (James Hardeman) (telling story of woman severely beaten on steps of post office because she had failed to get her husband's permission to leave the house and mail a letter); 1992 H.R. Hrg. 57 (Jane Doe) (husband allowed her "only to go to [her] job and come home and nowhere else"); 139 Cong. Rec. 31,292 (1993) (Rep. Olver) (submitting letter from abused woman prohibited by husband from going places, even grocery stores).

[12] "The threat of violence has made many women understandably afraid to walk our streets or use public transportation." 1990 S. Hrg., Pt. 2, at 80 (International Union, United Automobile, Aerospace & Agricultural Implement Workers of America—UAW); 1990 S. Hrg., Pt. 1, at 57 (Helen R. Neuborne, Executive Director, NOW Legal Defense and Education Fund) (describing self-imposed restrictions by female law school students who "routinely take precautions to protect themselves from the omnipresent threat of sex-based violence"). Women know that they cannot frequent places men can go without fear of attack. "Campuses, parking lots, libraries, shopping centers, parks, jogging trails—all are possible danger zones." 1991 S. Hrg. 253 (Dr. Leslie R. Wolfe, Executive Director, Center for Women Policy Studies); *see, e.g.*, Nov. 1993 S. Hrg. 41 (Jennifer Tescher) (after rape, could not bring herself to go out in public after dark).

about a third of women," it "takes a substantial toll on the lives of all women, in lost work, social, an[d] even leisure opportunities." 1991 S. Rep. 38.

As the legislative record also reflects, gender-based violence frequently denies women the basic right to travel from state to state, as spouses or boyfriends hunt them down or drive them from one jurisdiction to the next. One after another, witnesses described to Congress how they had become the interstate victims of abusive husbands or boyfriends who dragged the women from state to state to avoid detection of their crimes, or how the women themselves had fled across state lines to escape their batterers.[13]

Finally, Congress learned that "[i]t is not unusual for a college woman victimized by rape, to drop out of school altogether. And, even if a woman does not drop out, she may feel it necessary to interrupt her college career simply to avoid her attacker." 1991 S. Hrg. 243 (National Federation of Business and Professional Women, Inc.). Indeed, the legislative record is replete with instances where abusive husbands prevented their wives from securing an education, or where, as is alleged here, a violent sexual assault impelled the victim to quit or transfer schools.[14] Brzonkala's own experience epitomizes the evidence before

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[13] *See, e.g.*, 1994 H.R. Hrg. 15 (Karla M. Digirolamo) (fled with child out of state); Apr. 1993 S. Hrg. 75 (Dr. John Nelson) (telling story of abused woman who had fled across seven states with her eighteen-month-old child when her husband tracked her down and shot the child in the head, killing him); 1992 H.R. Hrg. 55 (Jane Doe) (battered in four different states and seven different cities); 1990 S. Labor Hrg. 32 (Sarah M. Buel) (fled from New York to New Hampshire, and after husband hunted her down, moved virtually every year of son's fifteen years of life).

[14] *See, e.g.*, Nov. 1993 S. Hrg. 41 (Jennifer Tescher) (lost interest in school after rape in sorority house); 1991 S. Hrg. 132-33 (Amy Kaylor) (after rape, dropped out of school for a quarter and ultimately lost the funding for her college education); 1990 S. Hrg., Pt. 2, at 6 (Christine Shunk) (transferred schools after one rape, and flunked classes, delaying her graduation, after a second rape); 139 Cong. Rec. 31,291 (1993) (Rep. Olver) (describing letter from woman whose husband would not permit her to "get an education because he believed she would cheat on him or run away when she went to classes").

Congress—that gender-based violence causes women like Brzonkala to leave school, abandon jobs, or cease patronizing certain businesses and forms of public transportation. *See* Staff of Senate Comm. on Judiciary, *Violence Against Women: A Week in the Life of America* 9 (Oct. 1992) ("Violence against women affects everyday lives, imperils jobs, infects the workplace, ruins leisure time and educational opportunities.").

In short, the legislative record demonstrates all too clearly that gender-based violence "permeates every aspect of women's lives. It alters where women live, work, and study, as they try to be safe by staying within certain prescribed bounds," 1991 S. Hrg. 253 (Dr. Leslie R. Wolfe), relegating women to "a form of second-class citizenship." 1990 S. Hrg., Pt. 1, at 57 (Helen R. Neuborne). Thus, unlike the vague multi-step "cost of crime" rationale that this Court rejected in *Lopez*—where gun possession near a school might lead to violent crimes, which might adversely affect the learning environment, which might lead to a less productive citizenry, and which, finally, might have an adverse effect on the national economy—the connection between gender-based violence and interstate commerce is substantial and direct.

2. The court of appeals failed to appreciate, however, that the question is not whether it was satisfied that gender-based violence exerts these effects on interstate commerce, but instead, whether Congress' legislative judgment that it does, was rational, as it surely was. *See Lopez*, 514 U.S. at 563 (Court evaluates "the legislative judgment" that a particular activity substantially affected interstate commerce). This Court reaffirmed in *Lopez* that federal statutes enacted pursuant to the Commerce Clause remain subject to rational basis review. *Id.* at 557; *see also id.* at 568 (Kennedy, J., concurring) (counseling reviewing courts to exercise "great restraint"). Accordingly, a "court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is *any rational basis* for such a finding." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981) (emphasis added); *accord Preseault v. ICC*, 494 U.S. 1, 17 (1990).

Nowhere has this Court been more sensitive to Congress' discretion in exercising its broad Commerce Clause authority than when, as here, Congress has determined that a particular class of conduct obstructs a discrete group's participation in commercial intercourse and thus warrants a federal response. In *Katzenbach v. McClung*, 379 U.S.

294 (1964), for example, the Court sustained the application of Title II of the Civil Rights Act of 1964 to Ollie's Barbecue, a family-owned restaurant in Birmingham, Alabama, which served a local clientele. The Court relied on evidence before Congress establishing that race discrimination in restaurants had "a direct and highly restrictive effect" upon interstate travel and hindered interstate commerce by affecting the volume of interstate goods sold and the success of local businesses. *Id.* at 300. Because Congress could find that racial bias by restaurants adversely affected commerce, the Court rejected the argument that Congress was required to include a provision compelling a case-by-case determination of the impact on interstate commerce. *Id.* at 303; *see also Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964).

Likewise, in upholding the extension of the Age Discrimination in Employment Act to state employers, this Court relied on the damaging economic impact of age discrimination, which "deprived the national economy of the productive labor of millions of individuals" and "inflicted on individual workers the economic and psychological injury accompanying the loss of the opportunity to engage in productive and satisfying occupations." *EEOC v. Wyoming*, 460 U.S. 226, 231 (1983). As the Court had put it in *McClung*: "this type of discrimination imposed 'an artificial restriction on the market' and interfered with the flow of merchandise." 379 U.S. at 299-300; *see also Daniel v. Paul*, 395 U.S. 298, 307 n.10 (1969) (recognizing that if "establishments narrow their potential markets by artificially restricting their patrons to non-Negroes, the volume of sales and, therefore, the volume of interstate purchases will be less") (citation omitted).

The same holds equally true for gender-based violence. As documented above, Congress found that such violence likewise "deprive[s] the national economy of the productive labor of millions" of women and inflicts on women severe and dislocating "economic injury" because of the loss of opportunity for women to engage fully in the activities that are the lifeblood of our national economy. The singling out of *women* to bear the brunt of so many crimes of violence imposes an "artificial restriction on the market" as serious as that presented by race discrimination in public accommodations and one that merits an equally serious federal response. *See* 1991 S. Hrg. 116 (Prof. Cass Sunstein) ("Congress could reasonably find . . . that the existence of sex-related

violence 'overhangs the market,' in the sense that it discourages women from working in jobs and travelling to places in which sex-related violence occurs."); *see Lopez,* 514 U.S. at 574 (Kennedy, J., concurring) (recognizing that Congress can regulate on the assumption that "we have a single market and a unified purpose to build a stable national economy").

Once Congress, after undertaking a careful investigation into a national problem of the highest order, makes specific findings justifying the exercise of its authority under the Commerce Clause, Congress' duty is discharged, its task complete, and its action entitled to a strong presumption of constitutionality.

B. Congress Deliberately Selected a Remedy That Respects Principles of Federalism.

This Court struck down the legislation in *Lopez* not only because of a perceived weakness in the link between gun possession near a school and commerce, but also because of concerns about the statute's intrusion into state prerogatives. Section 13981, by contrast, was narrowly drafted with the specific goals of minimizing any such invasion and maximizing cooperation between the federal and state governments in their fight against gender-based violence.

First, although the court of appeals' majority repeatedly referred to the civil rights remedy as a statute which "criminalize[s]" conduct, *e.g.*, Pet. App. 125a, that characterization is plainly incorrect. Section 13981 is a civil rights statute that authorizes a civil cause of action; it is *not* a criminal statute. Whereas, in the Court's view, the Gun-Free School Zones Act blurred the lines of political accountability and upset the federal-state balance by duplicating the criminal laws of more than 40 states barring the possession of firearms on or near school grounds, and by undermining innovative programs in many states designed to encourage the voluntary surrender of firearms, *id.* at 581-82 (Kennedy, J., concurring), § 13981 does no such thing. Unlike the gun possession statute, which added a "redundant layer of federal regulation in an area where most states had already acted," Pet. App. 276a (Motz, J., dissenting), § 13981 responds to the states' self-described needs without preempting or interfering with state prosecutions in any way. *See* Part II, Section A(2), *infra* (describing state task force reports).

Equally important, in contrast to the Gun-Free School Zones Act, § 13981 does not invade any area of traditional state concern. In 1991, the federal and state judiciaries voiced concerns that the civil rights remedy would federalize domestic relations law and unduly burden both federal and state courts. *See* 1993 H.R. Hrg. 74-76 (1991 Report from the Judicial Conference of the United States); 1991 S. Hrg. 314-17 (Conference of Chief Justices); 138 Cong. Rec. 582, 583 (1992) (Chief Justice Rehnquist, 1991 Year End Report on the Federal Judiciary). Based on this same assumption that the provision would federalize many domestic disputes, the Administrative Office of the U.S. Courts predicted that the civil rights remedy would "significantly affect the courts and their administration" by generating as many as 53,800 civil tort cases annually, with a projected 13,450 annual case filings expected in the federal courts. 1991 S. Hrg. 15-16.

Congress responded to these concerns. In the spring of 1993, then-Chairman Biden and Senator Hatch took the lead in negotiating modifications to the civil rights remedy specifically to narrow its scope, preserve state spheres of authority, and minimize the statute's effect on domestic relations law. These bipartisan revisions were incorporated in the version of S. 11 reported favorably out of the Senate Judiciary Committee later that year. First, the Committee strove to preserve the states' voice in enforcing the new right to be free from gender-based violence by giving state courts concurrent jurisdiction to enforce the statute, § 13981(e)(3), and by barring the removal to federal court of any state court action asserting claims under § 13981. 28 U.S.C. § 1445(d); *compare* S. 11 (as introduced), *with* 1993 S. Rep. 30 (S. 11 as amended).

Second, the Committee carefully avoided supplanting state tort law by clarifying that to be "motivated by gender" within the meaning of the provision, a crime of violence not only had to be committed "because of gender or on the basis of gender," but it *also* had to be "due, at least in part, to an animus based on the victim's gender." § 13981(d)(1); *compare* S. 11 (as introduced), *with* 1993 S. Rep. 30 (S. 11 as amended). Congress recognized that while women often are subject to violence for the same reasons as men (such as for robbery, burglary, larceny, and motor vehicle theft), "women also are victims of violence simply because they are women." 1991 S. Hrg. 262 (Dr. Leslie R. Wolfe). Accordingly, Congress drafted the statute specifically to target that gender bias;

moreover, by enacting a civil rights statute that requires invidious discriminatory motivation, Congress also avoided creating "a general federal tort law." 1993 S. Rep. 51 (citing *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971)).

Third, the Committee limited the statute so that it did not reach even all violent crimes motivated by gender animus. Only the most serious offenses, felonies, now qualify as a "crime of violence" under the statute. § 13981(d)(2)(A); *compare* S. 11 (as introduced), *with* 1993 S. Rep. 30 (S. 11 as amended). Finally and most importantly, the Committee narrowed the civil rights remedy so as to deny federal courts supplemental jurisdiction over state law claims "seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree." 42 U.S.C. § 13981(e)(4); *see also* 1993 S. Rep. 51 (the civil rights remedy "does not involve the Federal courts in divorce cases or domestic relations disputes"); 1991 S. Rep. 48.[15] Senator Hatch, as well as Senator Biden, was satisfied that Congress had been sufficiently sensitive to the important role of the states in addressing gender-based violence and that the revised provision struck the right balance between federal and state authority. *See* 139 Cong. Rec. 30,107 (1993) (Sen. Hatch) ("Despite some misconceptions, this measure does not make every sexual assault or rape a Federal offense. Rather, it recognizes that there is a proper role for the Federal Government in assisting the States in fighting violence against women.").

After these significant changes were made to the civil rights remedy narrowing its reach, the Judicial Conference dropped its opposition. 1993 H.R. Hrg. 70-71 (Letter from Judge Stanley Marcus, Chairman, Ad Hoc Committee on Gender-Based Violence). State officials, moreover, far from worrying about any supposed federal intrusion into state affairs, actively *urged* Congress to pass the Violence

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[15] Perversely, the Fourth Circuit took this exclusion of federal jurisdiction over state family law to imply that § 13981 *does* federalize state family law. Pet. App. 46a. It is difficult to see how § 13981 *arrogates* jurisdiction to the federal courts over family law matters when the statute explicitly precludes such jurisdiction.

Against Women Act, including its civil rights remedy.[16] Likewise, 33 Attorneys General have asked this Court to uphold the civil rights remedy because they "agree with Congress that gender-based violence substantially affects interstate commerce and the States cannot address this problem adequately by themselves." Amicus Brief of the States of Arizona, et. al. in Support of the Petition for a Writ of Certiorari, at 1. Significantly, the judiciary's concern about the potential impact of the statute on federal and state court case loads has not come to fruition. Although the precise number of cases filed is not known, there have been far fewer than one hundred reported cases asserting claims under § 13981 in federal court, and only a handful of reported cases in state court, since the statute's enactment in 1994.

Nor does § 13981, as the court of appeals feared, presage a new era of federal regulation of all crime, all domestic relations, and the like. *See* Pet. App. 89a. The statute simply represents an exercise of Congress' established power to remove obstructions to interstate commerce, whatever their source. *National Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 32, 37 (1937). As the vast majority of states have agreed, the problem of gender-based violence is national and interstate in nature, and accordingly "transcend[s] the abilities of State law enforcement agencies." 1993 S. Rep. 62. When the states fail to solve a national problem with a substantial impact on interstate commerce, Congress is free and duty-bound to act.

II. THE CIVIL RIGHTS REMEDY IS A VALID EXERCISE OF CONGRESS' POWER TO ENFORCE THE FOURTEENTH AMENDMENT.

Congress also enacted § 13981 as a means of redressing formal and informal biases against the victims of gender-based violence that

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[16] *See* 1993 H.R. Hrg. 34-36 (Letter from 41 Attorneys General urging Congress to pass the Violence Against Women Act, including its civil rights remedy, because "the problem of violence against women is a national one, requiring federal attention, federal leadership, and federal funds"); *id.* at 30-32 (National Association of Women Judges); 1991 S. Hrg. 37-38 (Resolution from the National Association of Attorneys General). *But see* 1993 H.R. Hrg. 77-84 (Conference of Chief Justices, expressing continued opposition to the civil rights remedy).

prevailed in state legal systems across the country. Congress' determination that such a remedy was appropriate to enforce the Fourteenth Amendment Equal Protection Clause is also entitled to great weight. As this Court recently reaffirmed: "It is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (citation omitted).

Much as it did in *Lopez* with respect to the Commerce Clause, this Court held in *Boerne* and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 119 S. Ct. 2199 (1999), that Congress was without power to enforce the Fourteenth Amendment without building a sufficient legislative record to justify its action. In *Boerne*, the Court held that by reinstating a standard of review for free exercise of religion claims not required by the First Amendment, the Religious Freedom Restoration Act impermissibly attempted to "alter[] the meaning of the Free Exercise Clause." 521 U.S. at 519. The Court rejected the claim that the statute advanced the narrower and clearly legitimate aim of redressing laws that unconstitutionally discriminated against religious beliefs and practices because "RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry." *Id.* at 530.

Similarly, in *Florida Prepaid*, the Court ruled that the Patent Remedy Act, which purported to abrogate the states' sovereign immunity from claims of patent infringement, could not be construed to enforce the Due Process Clause because the Court found "little support for the proposition that Congress sought to remedy a Fourteenth Amendment violation" in enacting the statute. 119 S. Ct. at 2208. Searching the record in vain for the "evil" or "wrong" that Congress intended to remedy, the Court found that "Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations." *Id.* at 2207. In the absence of "evidence of massive or widespread violation of patent laws by the States," the Court concluded that Congress simply had "acted to head off [a] speculative harm." *Id.* at 2207-08.

By contrast, in enacting the Violence Against Women Act civil rights remedy Congress did much more—meeting the new challenges set for it by this Court's recent decisions. As described below, Congress

identified and documented a "massive" and "widespread" pattern of equal protection violations by state actors, one that justified a federal response.

A. Congress Found Widespread Bias in State Legal Systems Against the Victims of Gender-Based Crimes, and Acted to Remedy That Bias.

Congress made specific findings justifying its enactment of § 13981 to enforce the Fourteenth Amendment. The Conference Report stated:

> State and Federal criminal laws do not . . . adequately provide victims of gender-motivated crimes the opportunity to vindicate their interests; existing bias and discrimination in the criminal justice system often deprives victims of crimes of violence motivated by gender of equal protection of the laws and the redress to which they are entitled . . . .

H.R. Conf. Rep. 385; *accord* 1993 S. Rep. 29 (same findings originally intended for the statutory text).

This considered congressional judgment, which the court of appeals dismissed out of hand as "legal boiler plate," Pet. App. 152a, was predicated on a considerable record documenting systemic gender bias and self-described failures by the states to treat gender-based violent attacks with the same seriousness accorded other major crimes. As the evidence before Congress revealed, crimes against women traditionally have been perceived as anything *but* crime—"as a 'family' problem, as a 'private' matter, as sexual 'miscommunication.'" 1991 S. Rep. 37. Congress learned that state legal systems had remained captive to archaic, stereotyped notions of the "proper place" for women in the family and society—a legacy of the common-law "rule of thumb." Rooted in historic skepticism of the veracity and gravity of charges of rape, 1991 S. Rep. 44 (citing Lord Matthew Hale's 17th century jury instruction that rape is a charge "easily to be made and hard to be proved, and harder to be defended by the party accused, tho' ever so innocent"), official and institutionalized suspicion of victims of gender-based violence lives on, Congress determined, in the guise of formal and informal barriers to justice not braved by victims of other serious violent crimes. *Id.* at 44-48; 1993 S. Rep. 49-50, 55.

1. As Congress found when it enacted the Violence Against Women Act, many victims of rape and other sexual assaults enjoyed no legal recourse whatsoever under state law. For example, when the bill was first introduced in 1990, the majority of states either did not make marital rape a prosecutable offense or downgraded it by allowing the crime to be charged only when aggravating factors, not required in other cases of rape, were present. 1993 S. Rep. 47 & nn.42-44, 55; 1991 S. Rep. 45 & nn. 49-50. Even sexual assaults by former husbands or boyfriends were immunized in some states from prosecution. *Id.* at 45 n.50 (noting that some states had extended marital rape exemptions to "cohabitants and formerly married persons").

The marital rape exemption rests on "archaic notions about the consent and property rights incident to marriage" that "are simply unable to withstand even the slightest scrutiny." *New York v. Liberta*, 474 N.E.2d 567, 573 (N.Y. 1984) (holding that the marital rape exemption violates the Equal Protection Clause). The premise of the exemption is that "a woman was the property of her husband and that the legal existence of the woman was 'incorporated and consolidated into that of the husband.'" *Id.* (citation omitted). This premise reflects nothing but gender bias in one of its worse forms, as this Court has recognized in other contexts.[17] "Nowhere in the common-law world—indeed in any modern society—is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being." *Trammel v. United States*, 445 U.S. 40, 52 (1980) (rejecting an absolute privilege against adverse spousal testimony). For this reason, many—but not all—courts have invalidated their states' exemptions or "downgrades" for marital rape or sexual assault as in

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[17] *See, e.g., United States v. Virginia*, 518 U.S. 515, 534 (1996) ("[C]lassifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.") (citation omitted); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982) ("Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions."); *Craig v. Boren*, 429 U.S. 190, 198 (1976) (Court has rejected "increasingly outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas'" and other "archaic and overbroad" generalizations).

violation of the Equal Protection Clause.[18]

State interspousal tort immunity doctrines further perpetuated archaic gender-stereotypes about the intrinsic "unity" of husband and wife. The Senate Judiciary Committee found that these doctrines erected yet another formal barrier to legal vindication for the victims of gender-based violence, this time in state civil legal systems. 1993 S. Rep. 55; 1991 S. Rep. 45. When Congress was considering the Violence Against Women Act, interspousal tort immunity barred women in ten states from suing her spouse under state tort law after a brutal attack. *See* 1990 S. Hrg., Pt. 1, at 64 (NOW Legal Defense and Education Fund). Not surprisingly, these laws frequently met the same fate as their criminal counterparts, with many courts declaring them to be in violation of the Equal Protection Clause.[19] Still other legal requirements unique to crimes of sexual violence conspired to prevent women from bringing their attackers to justice. *See* 1993 S. Rep. 45-46; 1991 S. Rep. 44-47.

That some states have reformed these laws does not mean that all states have done so. A victim hardly should be forced to wait and suffer flagrant violations of her constitutional rights until an appropriate case comes along to present a state court with an opportunity to strike down an

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[18] *See, e.g., Merton v. Alabama,* 500 So.2d 1301, 1305 (Ala. Crim. App. 1986); *Williams v. Alabama,* 494 So.2d 819, 830 (Ala. Crim. App. 1986); *Warren v. Georgia,* 336 S.E.2d 221, 226 n.11 (Ga. 1985); *Illinois v. M.D.,* 595 N.E.2d 702, 713 (Ill. App. Ct. 1992); *Shunn v. Wyoming,* 742 P.2d 775, 778 (Wyo. 1987).

[19] *See, e.g., Moran v. Beyer,* 734 F.2d 1245, 1248 (7th Cir. 1984) ("[W]e cannot find it at all rational to believe that the Illinois legislature's desire to protect marital harmony is fulfilled by [the statute], which does little more than grant one spouse almost unconditional license to make his marriage partner a sparring partner. We are, therefore, compelled to declare it unconstitutional."); *see also Jones v. Jones,* 376 S.E.2d 674, 675 (Ga. 1989); *Burns v. Burns,* 518 So.2d 1205, 1211 (Miss. 1988); *Estes v. Estes,* No. WD-84-36, 1984 WL 14313, at *4 (Ohio. App. Oct. 19, 1984); *Hack v. Hack,* 433 A.2d 859, 868 (Pa. 1981); *Price v. Price,* 732 S.W.2d 316, 320 (Tex. 1987).

offending law[20] or until her state legislature is motivated to act—assuming that such action is even effective.[21] And neither should Congress.

2. In concluding that "[w]omen often face barriers of law, of practice, and of prejudice not suffered by other victims of discrimination," 1993 S. Rep. 49, Congress relied, in part, on two dozen studies by state task forces on gender bias. *See id.* at 49 & n.52; 1991 S. Rep. 34, 43-44 & n.40. Congress found that "[s]tudy after study has concluded that crimes disproportionately affecting women are often treated less seriously than comparable crimes against men." 1993 S. Rep. 49; *accord* 1991 S. Rep. 43. "[C]ollectively," Congress concluded, "these reports provide overwhelming evidence that gender bias permeates the court system and that women are most often its victims." 1993 S. Rep. 49 (citation omitted); 1991 S. Rep. 43-44. Indeed, many state task force reports candidly admitted that gender bias was pervasive in their state legal systems.[22]

Congress perceived that an important reason state remedies have failed is "because legal rules and practices continue to shine a spotlight of suspicion on the victim." 1991 S. Rep. 44. Because of this "pervasive suspicion of rape victims' credibility," 1993 S. Rep. 45 (footnote omitted), courts, prosecutors, and law enforcement officers frequently

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[20] Ironically, because of the requirement of Article III standing, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), court challenges to marital rape exemptions have been beyond the victim's control. The validity of these exemptions generally have reached the courts when a defendant who could not claim the benefit of a state marital exemption challenged the exemption as denying *him* equal protection. *See, e.g., Liberta*, 474 N.E.2d at 569.

[21] Regrettably, Congress found that even when state legislatures have acted, implementation of victims' new rights has faltered. 1991 S. Rep. 46 ("The sad fact is that law reform has failed to eradicate the stereotypes that drive the system to treat these crimes against women differently from other crimes.").

[22] *See, e.g.*, 1991 S. Hrg. 135 (Gill Freeman, Chair, Florida Supreme Court Gender Bias Study Implementation Commission); Administrative Office of the California Courts Judicial Council, *Achieving Equal Justice for Women and Men in the Courts* 5 (1990); Supreme Court of Georgia, *Gender and Justice in the Courts* 1 (1991); Texas Gender Bias Task Force, *Final Report* 72 (1994).

require additional corroboration of victims' testimony, such as physical injuries, a prompt complaint, no prior contact with the defendant, and polygraph exams. *Id.* at 45-46; 1991 S. Rep. 44-47.

And "[a]s if the credibility issues were not burdensome enough, survivors must also face pervasive victim-blaming attitudes." 1991 S. Rep. 47. The Committee pointed to "the widespread belief that people who are raped precipitate in some way, whether it be by dress having a drink in a bar, accepting a ride in a car or accepting a date." *Id.* (quoting 1991 S. Hrg. 136 (Gill Freeman)). This entrenched "boys will be boys" / "she must have asked for it" mentality, 1993 H.R. Hrg. 8 (Sally Goldfarb, Senior Staff Attorney, NOW Legal Defense and Education Fund), is unique to gender-based violence. *See* Nov. 1993 S. Hrg. 48 (Julia Vigue, Rape Crisis Center) ("A double standard is very, very clear. Sex crime is the one area of criminality where we judge the offense not by the perpetrator but by the victim."). The notion that *women* cannot frequent bars, accept a car ride or a date, or go out late at night without assuming the risk of a violent sexual assault, is gender bias, plain and simple. This assumption that the woman had precipitated or "asked for" the attack boded particularly poorly for the victims of "acquaintance rape," which, as Congress learned, state prosecutors routinely refused to prosecute. 1991 S. Rep. 47.[23]

As further evidence of "the puzzling persistence of public policies, laws, and attitudes that treat some crimes against women less seriously than other violent crimes," 1991 S. Rep. 33, witness after witness gave painful testimony regarding the unwillingness of too many state police officers, prosecutors, and even judges, to treat domestic abuse as the egregious crime that it is,[24] leading Congress to conclude that

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[23] *See, e.g.*, 1993 H.R. Hrg. 9 (Sally Goldfarb) (reporting that the Oakland, California police department closed over 200 rape cases with little to no investigation because they involved prostitutes and drug users, as well as acquaintance rapes); 1991 S. Hrg. 137 (Gill Freeman) (reporting that prosecutors in Florida are unwilling to pursue acquaintance rape cases).

[24] As one prosecutor observed, "Police work on domestic cases generally reflect[s] the officers' attitude toward these cases: That they are unimportant and that they will go nowhere." 1992 H.R. Hrg. 70 (Margaret Rosenbaum, Assistant State Attorney); *see, e.g.*, 1994 H.R. Hrg. 18 (Karla M. Digirolamo)

"[g]ender bias contributes to the judicial system's failure to afford the protection of the law to victims of domestic violence." 1993 S. Rep. 46. Even civil protection orders, when domestic violence victims could obtain them, were of little use because of state officials' reluctance to enforce them.[25] Still others attested to the official predisposition to discredit,

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(police came when husband was kicking her while pregnant and told them "to keep it down" and went on their way); *id.* at 119-20 (Donna Lawson) (bereaved mother recounts the refusal of police to respond to daughter's boyfriend's daily ritual of forcing her daughter's car off the road, until finally, he killed her); Nov. 1993 S. Hrg. 15 (Lisa) (after husband stabbed her in the back and drove down the road dragging her from his truck, police commented that it looked like a "push/shove match" had taken place and did nothing); Apr. 1993 S. Hrg. 12 (Loretta Baca) (police officer asked her why she was filing charges against boyfriend for assault, given that she was "a Hispanic female and that was part of [her] culture," and prosecutor decided that "the only reason" she was filing charges was because she was "mad" at the boyfriend and was "probably already talking to him and sleeping with him"); *id.* at 82 (Barbara Wood, Executive Director, Turning Point) (battered women often told by officers that they cannot arrest the husband because "he might lose his job and that wouldn't be fair"); 1992 H.R. Hrg. 33-35 (Vivian Downing) (husband who shot her in the neck, leaving her a quadriplegic, was never prosecuted); *id.* at 57-58 (Jane Doe) (when police finally responded to call, they told her that if she wanted to keep her children, she should return to the house and "work everything out"); 1990 S. Labor Hrg. 6 (Mary Pat Brygger, National Woman Abuse Prevention Project) (study found that in 90% of domestic homicides, police had been called to the home at least once, and in more than 50% of the cases, five or more times); *id.* at 27 (Annette Stewart) (police responded to call and then left while husband was beating her up because husband told police they were only having a "domestic squabble"); *id. at* 77 (Barbara Zeek-Shaw, Project Safeguard) (judge berated a pregnant battered woman requesting a restraining order for "wasting the court's time" and told her she "should act more like an adult"; her husband subsequently beat, strangled, shot, and killed her).

[25] *See, e.g.*, Feb. 1993 S. Hrg. 31, 33 (Rep. Barbara Gray) (restraining orders not treated seriously); 1990 S. Labor Hrg. 28 (Annette Stewart) (police would not enforce her protection order); 1990 S. Hrg., Pt. 2, at 99 (Tracy Motuzick) (police refused to enforce restraining order against abusive husband, who ultimately stabbed her thirteen times and broke her neck, leaving her paralyzed); 139 Cong. Rec. 31,291-92 (1993) (Rep. Olver) (describing letter

blame, or stereotype the victims of rape or sexual assault for their attacks.[26] The inaction in this case of Virginia Tech, a state entity, was unfortunately, all too typical.

Given this "double victimization" of women—first at the hands of the attacker, and then, at the hands of the legal system—it should come as no surprise that, as Congress found, "[m]any of those crimes are never reported, fewer are prosecuted, and even fewer result in a conviction." 1990 S. Rep. 42; *see also* 1993 S. Rep. 42; 1993 H.R. Rep. 25-26. Victims fared no better in state civil justice systems. Although sexual assault is a tort in every state, one study found that only 255 civil jury trials in sexual assault cases had been conducted *over a ten-year period* and that fewer than one percent of all victims had collected compensatory damages. 1991 S. Rep. 44 & n.43.

3. As a result of the overwhelming evidence of bias in state legal systems, Congress was compelled to conclude: "From the initial report to the police through prosecution, trial, and sentencing, crimes against women are often treated differently and less seriously than other crimes." 1993 S. Rep. 42. Such institutionalized and sweeping disregard for victims of gender-based violence can hardly be dismissed as negligent or inadvertent. *See* Pet. App. 153a-155a. While a state may have no affirmative constitutional duty to protect its citizens absent some "special relationship," *DeShaney v. Winnebago County Dep't of Social Servs.*,

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from victim who had received 13 restraining orders against her husband, who was not charged with over 200 counts of violating them).

[26] *See, e.g.*, 1993 S. Rep. 46 (citing Louisiana sheriff's response to scene in which an attacker had shoved a screwdriver three inches into the victim's stomach and raped her, that "the victim must have 'incited' or 'provoked' the attacker"); 1992 H.R. Hrg. 40 (Jennifer Katzoff) (in response to her reported rape, campus security told her that because she had opened the door and had not screamed, that she "had asked for it, and that it was [her] fault"); 1991 S. Hrg. 63 (Roland W. Burris, Attorney General of Illinois) (judge dismissed a rape charge because the victim said that the attack took place at 10 a.m. because he believed that no one would break into an apartment in the daylight, with the shades up, and risk being seen by neighbors); *id.* at 293 (letter from Dawn Bosshard) (state authorities told victim of gang rape that there was nothing they could do, and one official asked her, "Isn't it your fantasy to be raped by four guys!").

489 U.S. 189 (1989), a state "may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause." *Id.* at 197 n.3. It is clear that "[d]iscrimination in providing protection against private violence [can] violate the equal protection clause of the Fourteenth Amendment." *Bowers v. Devito*, 686 F.2d 616, 618 (7th Cir. 1982).

Thus, § 13981 "takes aim at gender-discrimination of the type for which the 14th amendment provides heightened scrutiny." 1993 S. Rep. 55. As Congress properly concluded, in no case does it have greater power to legislate to enforce the Fourteenth Amendment than when, as here, "the criminal justice system is not providing equal protection of the laws [to] women in the classic sense." *Id.* (citing 1991 S. Hrg. 105 (Prof. Cass Sunstein)); *see also* 1993 H.R. Hrg. 96 (James P. Turner, Acting Assistant Attorney General) (the legislative record demonstrates "a classic denial of equal protection").

B. Congress' Choice of Remedy in Responding to the Failings of State Legal Systems Was Appropriate.

Finally, this Court has required legislation enforcing the Fourteenth Amendment to display "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). Relying on *Boerne*, the Fourth Circuit denounced the civil rights remedy as both under- and over-inclusive and thus lacking in both "congruence" and "proportionality." Pet. App. 157a-160a. Congress is entitled to greater latitude than that allowed by the court of appeals.

Section 13981 is calibrated precisely to address the constitutional violation that Congress had identified—the states' systemic failure to afford victims of gender-based violence an opportunity to vindicate their rights on a par with other victims of serious violent crime. Indeed, § 13981 is the *only* provision in the Violence Against Women Act that directly empowers these victims. As Congress explained: the civil rights remedy "puts another legal tool in victim's hands to call their attacker to account. Testimony before the committee shows that such remedies are important because they allow survivors an opportunity for legal vindication that the survivor, not the State, controls." 1990 S. Rep. 42; *see also* 1993 H.R. Hrg. 3 (Sally Goldfarb); 1991 S. Hrg. 105 (Prof. Cass

Sunstein); *id.* at 85-86 (Prof. Burt Neuborne).

Nonetheless, the court of appeals condemned the statute first, for not directly regulating the states themselves. Pet. App. 44a-45a, 157a. Yet Congress was not required, as the court suggested, to enact a far more sweeping and intrusive remedy for state failings, such as by preempting the states' criminal and tort laws altogether,[27] authorizing law suits directly against states or their officials, extending federal jurisdiction over family law matters, denying states concurrent jurisdiction over actions brought under § 13981, or by regulating *all* violence against women, regardless of the presence or absence of gender-based animus. *See* Pet. App. 44a-45a, 89a, 131a-132a. What the court of appeals saw as the statute's vice is actually its virtue: that Congress did none of these things underscores the care with which it crafted the civil rights remedy so as not to displace state laws or burden state functions. That Congress could have gone farther than it did, and taken action far more invasive to state sovereignty, is no reason to find the civil rights remedy void for lack of "congruence."[28]

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[27] Congress deliberately struck a careful balance between directly preempting discriminatory state laws, such as the marital rape exemption, and indirectly codifying such bias. Thus, by design, § 13981 includes within its definition of "crime of violence" those acts that would constitute a federal or state felony *but for the relationship* between the perpetrator and the victim; in other words, if a man committed what, under state law, would amount to a "crime of violence" but for the fact that the victim was his wife, § 13981 would furnish a remedy. § 13981(d)(2)(B). For the same reasons, Congress ensured that the commission of a qualifying "crime of violence" under the statute did not turn on whether the crime *actually* had led to criminal charges, prosecution, or conviction, § 13981(d)(2)(A), because Congress intended to redress the unequal enforcement of such crimes in state legal systems, not validate it.

[28] *Cf. Preseault v. ICC*, 494 U.S. 1, 18-19 (1990) ("[W]e are not at liberty . . . to hold the [statute] invalid merely because more Draconian measures—such as a program of mandatory conversions or a prohibition of all abandonments—might advance more completely the [congressional] purpose."); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981) ("Congress could constitutionally have enacted a statute prohibiting any state regulation of surface coal mining. We fail to see why the Surface Mining Act should become constitutionally suspect simply because Congress chose to allow the States a regulatory role.").

To hold otherwise would be to force Congress to take action that it knew to be as impractical and unwise, as it would be punishing to the states. Congress had no intention of assuming control over all of family law so that it could address the specific problem of gender-based violence. Similarly, Congress is without power to require the states to enact new laws more to its liking. *See New York v. United States*, 505 U.S. 144 (1992). The Fourteenth Amendment does not limit Congress to creating undesirable or unrealistic causes of action directly against the states or their agents. Instead of penalizing the states, Congress adopted the private attorney general model, in which private individuals sue to vindicate their rights while, at the same time, motivating states to do a better job of protecting those rights. *See City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986).

Section 13981's alleged overbreadth is also no constitutional defect. The court of appeals determined that the statute's remedy was "out of proportion" to any possible unconstitutional state action because it reaches all victims of gender-based crimes, all defendants who commit such crimes, and all states, without regard to the adequacy of their laws and enforcement efforts. Pet. App. 160a-161a. Yet it was reasonable for Congress to conclude that to require an individualized showing of state constitutional violations in each and every case would have imposed an undue—and likely impossible—burden of proof on the very victims whose access to the legal system Congress intended to ease, not restrict.

Such discretionary choices are in keeping with Congress' prophylactic power to effectuate the purposes of the Fourteenth Amendment. The remedy Congress selected corresponded to the nature of its findings: Congress found an across-the-board failure by states to provide equal protection to the victims of gender-based violence and responded by enacting an across-the-board remedy to permit those victims to bypass the state systems that too often had failed them.

CONCLUSION

As this Court recently recognized, "Our national experience teaches that the Constitution is preserved best when each part of the Government respects both the Constitution and the proper actions and determinations of the other branches." *City of Boerne v. Flores*, 521 U.S. 507, 535-36 (1997). Proper respect for the prerogatives of Congress

requires that this Court uphold the constitutionality of the Violence Against Women Act civil rights remedy. Accordingly, Senator Biden respectfully urges this Court to reverse the judgment of the court of appeals.

Respectfully submitted,

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